BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PATTI S. FOSTER Claimant	)	
V.	)	Docket No. 1,072,161
DILLON COMPANIES, INC. Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Self-insured respondent requested review of the March 13, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Matthew L. Bretz of Hutchinson, Kansas, appeared for claimant. Edward D. Heath, Jr. of Wichita, Kansas, appeared for respondent.

The ALJ found claimant's fall on October 10, 2014, arose out of and in the course of her employment with respondent because walking is connected to and inherent in performing her job. The ALJ ordered past medical paid as authorized and found claimant is entitled to temporary total disability (TTD) benefits from October 11, 2014, through January 23, 2015.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 10, 2015, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant suffered an unexplained fall which arose out of a neutral risk with no particular employment character; therefore, respondent maintains claimant's request for benefits should be denied.

Claimant did not submit a brief in this matter.

The sole issue for the Board's review is: did claimant meet with personal injury by accident arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant has been employed by respondent for 28 years. Claimant works in the customer service department, which requires constant movement around the customer service area for the duration of a shift.

On October 10, 2014, at approximately 3:30 p.m., claimant fell to the ground behind the customer service counter while working with Samantha Spiering. Claimant testified:

> Sam was close to me and the [cash register] drawer had popped and I thought she was going to fall, I thought she was – kind of lost her balance, and I went to shut the drawer and somehow I lost my balance.[1]

A security camera located above the customer service department recorded claimant's fall.

Prior to the fall, claimant was diagnosed with a blood sugar condition that caused occasional dizziness. Claimant stated her condition was regulated by August 2014, and at the time of her fall she was taking medication. Claimant testified she was not dizzy at the time of her fall. She said, "It was a good day, I was feeling good."[2] Claimant noted she did not slip prior to the fall, and there was no bump or obstruction in the floor that caused her to trip. She stated, "[E]verything just kind of happened."[3]

Store manager Cheryl Grossman assisted claimant in completing an accident report. Claimant explained she is left-handed and could not write after injuring her left wrist in the fall. The accident report indicates the object which caused claimant's fall was the ground.[4] Claimant stated she did not recall telling Ms. Grossman the ground caused her fall. Ms. Grossman also completed an Associate Incident report, a form to be completed by management. Ms. Grossman wrote:

> [Claimant] was assisting customers when she either tripped over her feet or passed out. She isn't sure which but she tried to catch herself and fell on her left wrist . . . .[5]

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[1] P.H. Trans. at 20.

[2] P.H. Trans. at 21.

[3] *Id*. at 24.

[4] See *Id*., Resp. Ex. B at 1.

[5] *Id*. at 2.

Claimant disagreed, stating she never told Ms. Grossman she may have passed out. Claimant testified:

> Q. Do you have any idea why that was included in [Ms. Grossman's] description?
>
> A. No. I don't know if she thought I passed out after I fell, because that might have – when I was on the ground. It's kind of blurry.[6]

After claimant fell, Ms. Grossman drove claimant to the emergency room at Hutchinson Regional Medical Center. Claimant was diagnosed with a distal radius fracture and ulnar styloid fracture of the left wrist. She eventually underwent two left wrist surgeries with Dr. Jonathan Loewen: a closed reduction and percutaneous pinning on October 14, 2014, and surgical removal of the hardware on December 23, 2014. Claimant was released from treatment on January 23, 2015, at which time she returned to work for respondent. Claimant testified she did not work from October 11, 2014, to January 23, 2015.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f) states, in part:

> (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

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[6] P.H. Trans. at 28.

> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
>
> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
>
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
>
> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
>
> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

The video shows claimant beginning to walk to her left when the fall occurred. Claimant was close to and facing the counter helping a customer immediately prior to the fall. She could not walk forward from her position. She was required to move backwards, right or left. To move to the left, without backing up, claimant crossed her right foot over and in front of her left foot allowing her to move to the left. She caught her foot and fell. The maneuver of moving to the left in the manner displayed in the video appears to be distinctly associated with the performance of claimant's employment.

Respondent argues claimant's accident is not compensable because it arises from an unexplained fall and had no relationship to her employment. The undersigned disagrees. The cause of claimant's fall is not unexplained or idiopathic. Claimant tripped over her foot while performing a maneuver required by her employment. A Board Member in a recent decision wrote, "[A] claimant's klutziness and haste, as based on the particular facts of this case, are not defenses to compensability."[9] The same applies in this case.

CONCLUSION

Claimant suffered an injury by accident arising out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated March 13, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2015.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

[8] K.S.A. 2013 Supp. 44-555c(j).

[9] *Fratzel v. Price Chopper*, No. 1,066,540, 2014 WL 517247 (Kan. WCAB Jan. 27, 2014).

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